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CAROLINA CASUALTY INSURANCE CO.

**UNITED STATES DISTRICT COURT**

**DISTRICT OF NEVADA**

CAROLINA CASUALTY INSURANCE CO.,  
a Florida corporation,

Plaintiff,

v.

DONALD K. McGHAN; JAMES J.  
McGHAN; MARC S. SPERBERG;  
THEODORE R. MALONEY; THOMAS R.  
MOYES; SAMUEL CLAY ROGERS; PAUL  
R. KIMMELL; EUGENE I. DAVIS; MARK E.  
BROWN; THOMAS Y. HARTLEY; ROBERT  
FORBUSS; and IKRAM KHAN,

Counterclaimants.

MARC S. SPERBERG,

Counterclaimant,

vs.

CAROLINA CASUALTY INSURANCE CO.,

Counterdefendant.

Case No.: 2:07-CV-00949-PMP-GWF

**MOTION TO DISMISS  
COUNTERCLAIMANTS'  
COUNTERCLAIM FOR BREACH OF  
NRS 686A.310 AND  
COUNTERCLAIMANTS' CLAIMS FOR  
PUNITIVE AND SPECIAL DAMAGES  
AND MEMORANDUM IN SUPPORT  
THEREOF**

1 THOMAS R. MOYES; SAMUEL CLAY  
2 ROGERS; PAUL R. KIMMELL; EUGENE I.  
3 DAVIS; MARK E. BROWN; THOMAS Y.  
HARTLEY; ROBERT FORBUSS; and  
IKRAM KHAN,

4 Counterclaimants,

5 vs.

6 CAROLINA CASUALTY INSURANCE CO.,

7 Counterdefendant.


8 TO: DEFENDANTS AND THEIR ATTORNEYS OF RECORD:

9 PLEASE TAKE NOTICE that Plaintiff/Counterdefendant CAROLINA CASUALTY  
10 INSURANCE CO. ("Plaintiff") hereby moves the court to dismiss, for failure to state a claim upon  
11 which relief can be granted, the portions of the Counterclaim of Counterclaimants THOMAS R.  
12 MOYES', SAMUEL CLAY ROGERS', PAUL R. KIMMELL's, EUGENE I. DAVIS', MARK E.  
13 BROWN's, THOMAS Y. HARTLEY's, ROBERT FORBUSS', and IKRAM KHAN's  
14 ("Counterclaimants") that: (1) assert breach of NRS 686A.310; and (2) seek punitive and special  
15 damages. Plaintiff's motion is based on this Notice of Motion and Motion, the Memorandum of  
16 Points and Authorities filed in support herewith, and the pleadings and papers on file herein.

17 DATED: November 26, 2007

**DUANE MORRIS LLP**

18  
19 By:

  
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23 Attorneys for Plaintiffs/CounterCounterclaimants  
24 CAROLINA CASUALTY INSURANCE CO.  
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**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION**

Plaintiff, an insurer, brought this declaratory relief action against Defendants, who are insureds, to determine the parties' respective rights and obligations under a Directors and Officers' and Corporate Liability Insurance Policy No. 1706787/1, issued by Plaintiff to MediCor, Ltd., which was in effect for a Policy Period of June 30, 2006 to June 30, 2007 (the "Policy"). Defendants (directors and/or officers of MediCor, Ltd. and/or other entities) were sued for, *inter alia*, conduct related to improper handling of funds in the control of Section 1031 exchanges, and as a result, Defendants, including Counterclaimants, made a claim for advancement of Costs of Defense and potential indemnity under the Policy. During the pendency of this action, Plaintiff has agreed to advance Costs of Defense to Counterclaimants in the underlying actions via an Interim Funding Agreement, pending approval by the U.S. Bankruptcy Court for the District of Delaware, in connection with the Chapter 11 proceedings captioned *In re MediCor, Ltd., et al.*, Case No. 07-10877-MFW.

In response to Plaintiff's Complaint for declaratory relief, Counterclaimants filed an unfounded Counterclaim (the "Counterclaim") that alleges, in Count II, breach of NRS 686A.310, Nevada's unfair claims practices statute.

Count II should be dismissed for failure to state a claim for which relief can be granted, for the following reasons. Count II of the Counterclaim fails to allege any conduct that actually violates the statute. This is because Counterclaimants simply cannot allege any conduct by Plaintiff that amounts to an unfair claims practice under the statute because no such conduct occurred. Moreover, Counterclaimants' "bad faith" allegations by themselves do not suffice. Instead, Counterclaimants solely allege that Plaintiff violated "multiple sections" of NRS 686A.310 without alleging how, why, or even which of the sixteen (16) subsections of the statute Counterclaimants contend were violated. Counterclaimants' bare claim for breach of NRS 686A.310 under Count II of their Counterclaim must be dismissed for failure to state a claim upon which relief can be granted.

Counterclaimants' claims for punitive and special damages are likewise deficient. Like their claim for unfair claims practices, Counterclaimants summarily allege an entitlement to punitive

1 damages for violation of NRS 686A.310 (under Count II of their Counterclaim) and for breach of the  
 2 covenant of good faith and fair dealing (under Count I of their Counterclaim) without alleging any  
 3 such conduct or bases therefor – again, simply because there are no facts for the Counterclaimants to  
 4 allege in this regard. Counterclaimants do not even allege the requisite malice, oppression, or fraud,  
 5 let alone state facts to support such an assertion. Counterclaimants have also failed to plead special  
 6 damages with any specificity as required, again, merely alleging an entitlement thereto without any  
 7 details. Thus, Counterclaimants’ allegations for punitive relief and special damages in Counts I and  
 8 II of their Counterclaim are also plainly insufficient.

9 Therefore, Counterclaimants’ claims for breach of NRS 686A310 under Count II of their  
 10 Counterclaim, and their claims for punitive damages and special relief under Counts I and II of their  
 11 Counterclaim, must be dismissed for failure to state a claim for which relief may be granted.

## 12 **II. ARGUMENT**

### 13 **A. Legal Standard**

14 A counterclaim should be dismissed when it fails to state a claim upon which relief can be  
 15 granted. Fed. R. Civ. P. 12(b)(6). Dismissal is appropriate if it appears to a certainty that the non-  
 16 moving party would not be entitled to relief under any set of facts that could be proven consistent  
 17 with the allegations. *NL Industries, Inc. v. Kaplan*, 792 F.2d 896, 898 (9<sup>th</sup> Cir. 1986); *O’Connor v.*  
 18 *Circuit Court*, 2006 U.S. LEXIS 80400, \*5 (D. Nev.), citing *Hishon v. King & Spalding*, 467 U.S.  
 19 69, 73, 104 S.Ct., 2229, 2232 (1984). A motion to dismiss should be granted if it appears beyond  
 20 doubt that the non-movant can prove no set of facts in support of his claim which would entitle him  
 21 to relief. *Moore v. City of Costa Mesa*, 886 F.2d 260, 262 (9<sup>th</sup> Cir. 1989).

22 All allegations of material fact should be taken as true and construed in a light most favorable  
 23 to the non-moving party. *Id.* However, conclusory allegations and unwarranted inferences are  
 24 insufficient to defeat a motion to dismiss for failure to state a claim. *In re Stac Electronics*  
 25 *Securities Litigation*, 89 F.3d at 1403. Courts should not assume the truth of legal conclusions  
 26 merely because they are cast in the form of factual allegations. *Shuffle Master, Inc. v. Awada*, 2006  
 27 U.S. Dist. LEXIS 71748, \*9 (D. Nev.), citing *W. Mining Council v. Watt*, 643 F.2d 618, 624 (9<sup>th</sup> Cir.  
 28 1981).

**B. Counterclaimants' Claim For Breach Of NRS 686A.310 Must Be Dismissed Because They Have Failed To State A Claim Upon Which Relief May Be Granted And Cannot Prove Any Set Of Facts That Would Support Such a Claim.**

Counterclaimants summarily assert under Count II of their Counterclaim breach of NRS 686A.310 – Nevada's unfair claims practices statute – without identifying which of the specific subsections of the statute that Plaintiff allegedly violated. Moreover, even without regard to Counterclaimants' failure to specify any specific subsection of the statute, Counterclaimants' allegations simply do not give rise to a breach of any of the provisions set forth in the statute. Therefore, Count II of the Counterclaim, for breach of NRS 686A.310, must be dismissed in its entirety for failure to state a claim upon which relief can be granted.

NRS 686A.310, Nevada's unfair claims handling practices statute, provides very specific scenarios of what constitutes an unfair claims handling practice by an insurer. It creates a private right of action by an insured against its insurer for breaches of the enumerated unfair practices, which are specifically listed in the statute. *See Hummel v. Continental Cas. Ins. Co.*, 254 F.Supp. 2d 1183, 1191 (D. Nev. 2003).

The statute prohibits different conduct than that which comprises the common law tort of bad faith. *Hart v. Prudential Property & Cas. Ins. Co.*, 848 F.Supp. 900, 904-905 (D. Nev. 1994). Nevada has rejected the notion that bad faith is broad enough to include the manner in which a claim is processed (*i.e.*, the conduct which NRS 686A.310 prohibits). *Pioneer Chlor Alkali Co., Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 863 F.Supp. 1237, 1246 (D. Nev. 1994). Thus, Counterclaimants' mere allegations of "bad faith" do not constitute a violation of NRS 686A.310. Counterclaimants' failure to specify which subsections of NRS 686A.310 it alleges Plaintiff violated is further evidence that no facts exist to support such a claim.

Just like the Counterclaimants in this case, the claimant in *Hummel* failed to cite which subsection of the unfair practices statute it alleged the insurer was engaged in. *Hummel*, 254 F.Supp. 2d at 1191. The court in *Hummel* compared the claimant's allegations to NRS 686A.310, in an effort to find a potentially applicable subsection, but concluded that the insurer had not violated the

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1 statute as a matter of law (in the context of a motion for summary judgment). *Id.* That is the case  
2 here as well.

3 Counterclaimants only summarily allege that Plaintiff “is in violation of multiple sections of  
4 NRS 686A.310” yet fail to allege how or why. (*See* Dckt. #52, 10:5-7). Counterclaimants’  
5 allegations, when examined against the specific provisions of NRS 686A.310, fail to constitute a  
6 violation of any subsection. Conclusory allegations of law and unwarranted inferences are  
7 insufficient to defeat a motion to dismiss for failure to state a claim. *In re Stac Electronics*  
8 *Securities Litigation*, 89 F.3d 1399, 1403 (9<sup>th</sup> Cir. 1996), *cert. denied*. Counterclaimants simply  
9 have not alleged any conduct by Plaintiff which would violate NRS 686A.310 and have therefore  
10 failed to state a claim upon which relief can be granted. Therefore, Counterclaimants’ claim for  
11 breach of NRS 686A.310 should be dismissed for failure to state a claim for which relief can be  
12 granted.

13 **C. Counterclaimants’ Claims For Punitive and Special Damages Under Both**  
14 **Counts of Their Counterclaim Should Be Dismissed For Failure to State a Claim**  
**Upon Which Relief Can Be Granted.**

15 Whether this Court denies Plaintiff’s motion to dismiss Count II of the Counterclaim in its  
16 entirety or not, Counterclaimants’ claim for punitive damages and special damages under both Count  
17 II and Count I of their Counterclaim (for the alleged breach of the implied covenant of good faith  
18 and fair dealing) should also be dismissed. The punitive and special damages claims under both  
19 Counts of the Counterclaim are improper as a matter of law, given the facts in this case.  
20 Counterclaimants have not and cannot demonstrate, under any set of facts consistent with their own  
21 allegations, that they are entitled to punitive relief or special damages.

22 Under Nevada law, the conduct required to recover punitive damages is “oppression, fraud or  
23 malice;” such action must be demonstrated by clear and convincing evidence. NRS 42.005.  
24 Nowhere do Counterclaimants allege the requisite “oppression, fraud or malice” in their  
25 counterclaim for breach of NRS 686A.310 sufficient to impose punitive damages. Punitive damages  
26 are not supported where the claim does not allege “oppression, fraud or malice.” *See Sprouse v.*  
27 *Wentz*, 105 Nev. 597, 601, 781 P.2d 1136, 1138 (1989).

28 Even though Counterclaimants essentially allege bad faith on Plaintiff’s part, bad faith in and

of itself cannot establish liability for punitive damages. *United Fire Ins. Co. v. McClelland*, 105 Nev. 504, 512, 780 P.2d 193, 198 (1989). To recover punitive damages, a party must affirmatively demonstrate “oppression, fraud or malice.” *Id.* Oppression is defined as despicable conduct that subjects a person to cruel and unjust hardship with conscious disregard of the rights of the person. NRS 42.001(4). Malice is defined as conduct intended to injure a person or despicable conduct engaged in with a conscious disregard for the rights or safety of others. NRS 42.001(3). Fraud is defined as an intentional misrepresentation, deception or concealment of a material fact known to the person with the intent to deprive another person of his rights or property or to otherwise injure another person. NRS 42.001(2). None of these actions have been alleged, **nor can they be alleged, based on the facts in this case.**

Likewise, Counterclaimants’ claims for special damages in Counts I and II of their Counterclaim are deficient because Counterclaimants utterly failed to plead special damages with the requisite specificity. When items of special damage are claimed, they must be specifically stated. Fed. R. Civ. P. 9(g). The objective under Rule 9(g) is to guard against unfair surprise. *Bowles v. Osmose Utils. Servs.*, 443 F.3d 670, (2006). In addition, the requirement to state special damages with specificity permits groundless claims to be discovered and dismissed early in litigation. *Brown & Williamson Tobacco Corp. v. Jacobson*, 713 F.2d 262, 270 (7<sup>th</sup> Cir. 1983). Where special damages are alleged, they should be set forth in itemized form. *Kuenzell v. United States*, 20 F.R.D. 96, (C.D. Cal. 1957). Conclusory or bare allegations of injury are insufficient, as are allegations based on mere speculation or conjecture. *Lebeda v. A.H. Robins Co.*, 101 F.R.D. 689, 690 (D. Me. 1984); *Everco Indus., Inc. v. O.E.M. Prods. Co.*, 63 F.R.D. 662, 666 (N.D. Ill. 1974). Here, Defendants fail to specifically allege any items of special damage, but instead only baldly assert a general entitlement thereto. (See Dckt. #52, 9:25-26, 10:6-7).

Because Count I of the Counterclaim, for breach of the implied covenant of good faith and fair dealing, and Count II of the Counterclaim, for breach of NRS 686A.310, both wholly fail to allege that Plaintiff acted maliciously, oppressively, or fraudulently, and fail to allege adequately any conduct sufficient to impose either punitive or special damages, this Court must dismiss

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1 Counterclaimants' punitive and special damages claims for failure to state a claim for which relief  
2 may be granted.

3 **III. CONCLUSION**

4 For the foregoing reasons and arguments, this Court should dismiss, for failure to state a  
5 claim for which relief may be granted: (1) Count II of the Counterclaim, for breach of NRS  
6 686A.310; and (2) Counterclaimants' claims under both Counts I and II of their Counterclaim for  
7 punitive and special damages.

8 DATED: November 26, 2007

**DUANE MORRIS LLP**

9  
10 By: 

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**PROOF OF SERVICE**

I hereby certify that I am a citizen of the United States and am employed in Clark County, where this mailing occurs. I am over the age of eighteen years and not a party to the within entitled action; my business address is 701 Bridger Avenue, Suite 670, Las Vegas, Nevada 89101.

On November 26, 2007, I served the document described as **PLAINTIFF CAROLINA CASUALTY INSURANCE CO.'S MOTION TO DISMISS COUNTERCLAIMANTS' COUNTERCLAIM FOR BREACH OF NRS 686A.310 AND COUNTERCLAIMANTS' CLAIMS FOR PUNITIVE AND SPECIAL DAMAGES AND MEMORANDUM IN SUPPORT THEREOF** on the interested party(ies) in this action as follows:

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☐ **BY MAIL:** I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Las Vegas, Nevada, in the ordinary course of business.

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☒ **BY ELECTRONIC SERVICE:** I served a true copy, with all exhibits, electronically on designated recipients via electronic transmission of said document(s) as provided under Federal Rules of Civil Procedure.

  
Jana Dailey  
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